

# 'Ze-Gate': Excepting Accountability

---

Alina Cherviatsova

2019-10-15T09:14:38

On September 24, the democrats in the House of Representatives announced a formal impeachment inquiry of President Trump for allegedly having pressured Ukrainian President Zelenskiy during a July call to probe Joe Biden, former US Vice-President and Trump's political rival. Ukraine and its newly elected President Zelenskiy are now in the middle of an American political storm – the Ze-gate <sup>1)</sup>The term 'Ze-gate' should be explained: 'Ze' is taken from the family name of incumbent President of Ukraine Volodymyr Zelenskiy, who in Ukrainian has the nickname 'Ze': Ze-president, Ze-team, Ze-deputies, Ze-government, etc.; 'gate' derives from the Watergate scandal which resulted in the resignation of American President Richard Nixon. – generated by irreconcilable confrontation between the democrats and the republicans one year before the US presidential elections.

In order to prove that President Trump did nothing wrong and his talk with Zelenskiy had *no quid pro quo*, the White House released the call's transcript. The content of the conversation raises questions about the integrity of Ukraine's President. Impeaching Zelenskiy, however, is not a viable option as Ukraine's constitution sets a practically unattainable threshold for impeachment.

## What did Ze-president say?

In the USA, Ze-gate had the effect of a bombshell and the topic is likely to be central during the whole presidential campaign. In Ukraine, where society is mostly preoccupied with internal problems, American political events related to Zelenskiy have not been in the center of public debates, despite the annoying and embarrassing character of the released transcript.

The parts of the conversation [where President Zelenskiy speaks about the Prosecutor General of Ukraine](#) responding to Trump's remark on Biden's son are those that are legally relevant:

I wanted to tell you about the prosecutor. First of all, I understand and I'm knowledgeable about the situation. Since we have won the absolute majority in our Parliament, the next prosecutor general will be 100% my person, my candidate, who will be approved, by the parliament and will start as a new prosecutor in September. He or she will look into the situation, specifically to the company that you mentioned in this issue. The issue of the investigation of the case is actually the issue of making sure to restore the honesty so we will take care of that and will work on the investigation of the case...

This passage shows, first, Zelenskiy's readiness to undermine the authority of the newly appointed Prosecutor General of Ukraine and, second, that President Zelenskiy, following the example of his predecessors, does not see the Prosecutor's

Office of Ukraine as an independent state-body. If that is the case, the current reform of the Prosecutor's Office will change nothing in terms of efficiency, political neutrality, independence and impartiality of the system.

On September 23, one day before the democrats launched the impeachment inquiry, President Zelenskiy signed [the law on reforming procuracy of Ukraine](#) which is aimed to finish the reform started in 2014. Until now, despite significant changes in the procuracy, Ukraine has not managed to clean up corruption. The latest law, initiated by President Zelenskiy, foresees structural changes, staff reduction (up to 15 000 people), massive firing of Ukrainian prosecutors and their re-appointment after recertification. The law is aimed to create new cadres of prosecutors untainted by the corrupt practices. But all efforts to solve the problem of endemic corruption inside the procuracy are ineffective if the system is not protected against interference and remains under presidential control.

## How should things be?

International law provides states with legal procedures and mechanisms to ensure cooperation in the field of legal assistance. In this case, this is [the Treaty between the USA and Ukraine on mutual legal assistance on criminal matters](#) signed in 1998 (entered into force in 2001). Under the Treaty,

the Contracting States shall provide mutual assistance, in connection with the investigation, prosecution, and prevention of offenses, and in proceedings related to criminal matters.

The Treaty defines central authorities which are authorized to make and receive requests regarding legal assistance. For the USA, this is the Attorney General, or a person designed by the Attorney General; the Ukrainian side should be represented by the Ministry of Justice and the Office of the Prosecutor General. . There should thus be no 'nice' calls of President Trump to President Zelenskiy or meetings between the President of Ukraine and Trump's private lawyers, assistants and consultant, but an official request from the US Attorney General to the Ukrainian Ministry of Justice and the Office of the Prosecutor General.

Responding to Trump's 'I would like you to do us a favor' Zelenskiy could have made some general comments about corruption and his commitment to fight it. But he wanted to please his American counterpart. The best way to do that was to assure Trump that the procuracy of Ukraine is under the presidential control.

## Impeachment in Ukraine – A free pass on accountability

### *(i) Constitution*

Trump's call to President Zelenskiy has become a big story in the USA, while for Zelenskiy it was an episode. Ze-gate is the first blow for Zelenskiy as it gives reason

to doubt his sincerity and honesty, which were his strongest points. Interestingly, the statement that the Prosecutor General is ‘the President’s person’ has been ignored by critiques in Ukraine, who were preoccupied with Zelenskiy’s negative remarks regarding the EU, Germany and France (‘they are not doing quite as much as they need to be doing on the issues with the sanctions’), as well as with the difficult political choice – between the democrats and the republicans – Kyiv has faced. The fact that the President of Ukraine declared his readiness to meddle in the prosecutor’s affairs has been left without attention. The matter is that the prosecution of Ukraine should be independent; any interference in its activity is deemed illegal. One can only assume that if the political situation in Ukraine were different – President Zelenskiy is not buttressed by an unprecedented parliamentary majority with 254 seats out of 450 – he would have to pay a higher price, including a question about impeachment, for the careless words about the procuracy of Ukraine.

In this regard, some comments on impeachment under constitutional law of Ukraine should be made especially since a new law on impeachment came into force, by symbolical coincidence, on September 25, the same day the White House released a transcript.

Impeachment, a special procedure for removing the president of Ukraine from office, was introduced to Ukrainian legislation in 1996 with the adoption of [the Constitution of Ukraine](#). It has never been used mainly because of three reasons: (i) very narrow list of grounds for impeachment, (ii) complexity of the procedure as such and (iii) uncertainty of regulation.

Under Article 111 of the Constitution of Ukraine the president can be impeached only for committing treason or other crime. The procedure cannot be invoked if the president breaches the oath or violates the Constitution. The Constitution determines that impeachment be implemented by the Parliament with participation of the Constitutional Court of Ukraine and the Supreme Court of Ukraine. For moving on with impeachment, the parliament should demonstrate a growing consolidation – with each stage, the procedure demands more deputies to support impeachment.

According to Article 111, impeachment can be initiated by a simple parliamentary majority (226 people’s deputies) which establishes a special *ad hoc* investigating commission, composed of a special prosecutor and special investigators. On the next stage, a qualified majority of two-thirds (300 people’s deputies) should approve the results of investigation and decide on charges against the president. As a next step, the *Verkhovna Rada* (the Parliament) should appeal to the Constitutional Court of Ukraine (for an opinion on the constitutionality of the investigation and procedures) and the Supreme Court (for an opinion that the accusations against the president contain signs of treason or other crime). Finally, a decision to remove the president from office should be supported by at least three-quarters (!) of the parliament’s constitutional membership (338 people’s deputies). Notably, Article 111 is the only article of the Constitution which refers to a majority of three-quarters. To compare, amendments to the Constitution (Titles I, III, XIII) can be made if approved by a majority of two-thirds.

*(ii) Newly-adopted law on impeachment*

The Ukrainian version of impeachment has been widely criticized for granting the president immunity from prosecution and placing this institute above the law. Impeachment in Ukraine is so complicated that the parliament could not even impeach Viktor Yanukovich. Instead, on February 22, 2014, the day after Yanukovich had to flee to Russia, the *Verkhovna Rada* removed him from office for neglecting his constitutional obligations as he had ['restrained himself from performing his constitutional duties which threatens the governance of the state, the territorial integrity and sovereignty of Ukraine, human rights and fundamental freedoms'](#). Notably, the decision, supported by 328 people's deputies, refers to 'the sovereign will of people' and 'the circumstances of extreme urgency' but not to the Constitution.

Thus, considering the complexities of impeachment, it rather provides the president a 'shelter of unaccountability' than a constitutional mechanism for removal the president from office. In addition, the constitutional provisions regarding the special investigating commission, special prosecutor and special investigators remained unclear for a long time and required a special law to be passed. A new law on impeachment has filled the gap. Yet, it has failed to solve systemic problems inherent in Article 111.

For President Zelenskiy and his team the law on impeachment has a special political meaning: one of Zelenskiy's campaign promises was to clean up Ukrainian politics and tackle corruption. He pledged that the parliament would pass legislation to spell out procedures for presidential impeachment so that if the president breaks the law he can be impeached. At first sight, the adoption of law on impeachment proves Zelenskiy's commitment to his electoral promises. But the problem is that a law which details provisions of Article 111 cannot ensure efficiency of impeachment without amending the Constitution. As a result, Zelenskiy believes that he has fulfilled his promise ('I am starting with myself and signing the law on presidential impeachment that was adopted by the parliament') while the newly-adopted law on impeachment has changed nothing and unaccountability of the President remains a feature of the Constitution.

Ze-gate is still on the first pages of the leading European and American newspapers mentioning corruption, Ukraine, its president, former and current prosecutors. It destroys Ukraine's image as a sovereign and independent state. At the same time, on the national level, there is a real danger that President Zelenskiy will not be able to keep his promises and deceive the expectations of his voters. In this regard, his attitude towards the Prosecutor's Office and the peculiarities of the law on impeachment are very indicative: Zelenskiy has undermined reform of the Prosecutor's Office to create an independent and politically neutral system, cleaned of corruption by stating that he controls the Prosecutor General. At the same time, the promises to ensure responsibility of the president by means of a special law on impeachment are subverted by complexities of constitutional procedure which has not been changed.

*This post was drafted during the Early Career Fellowship at the Law Department of the University of Turin (project Dipartimento di Eccellenza MIUR 2018-2022).*

## References

- 1. The term 'Ze-gate' should be explained: 'Ze' is taken from the family name of incumbent President of Ukraine Volodymyr Zelenskiy, who in Ukrainian has the nickname 'Ze': Ze-president, Ze-team, Ze-deputies, Ze-government, etc.; 'gate' derives from the Watergate scandal which resulted in the resignation of American President Richard Nixon.

